IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. MALIK CORNELL PRIOR, Appellant.	)	2 CA-CR 2004-0059 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200200148

Honorable Thomas E. Collins, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and David A. Sullivan — Tucson
Attorneys for Appellee

Harriette P. Levitt — Tucson
Attorney for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 A jury found appellant Malik Cornell Prior guilty of three counts of sexual assault, class two felonies; two counts of kidnapping, also class two felonies; and burglary of a residential structure, a class three felony. The trial court sentenced Prior to prison terms of fourteen years for each count of sexual assault, ten years for each count of kidnapping,

and seven years for the count of burglary. On all counts, the court ordered the aggravated sentences to be served consecutively. On appeal, Prior challenges his convictions, arguing the trial court erred in denying his motions to sever the charges involving the three adult victims and to preclude evidence of other acts. He also challenges his sentences under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), arguing the trial court erred in imposing aggravated sentences without a jury's determining any of the aggravating factors the court cited. For the reasons stated below, we affirm.

¶2 "We view the facts and all reasonable inferences therefrom in the light most favorable to upholding the verdicts." *State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999). On August 31, 2001, at approximately 3:00 a.m., K. was jogging in Sierra Vista when a man attacked her from behind and knocked her to the ground. The man put his hand over her mouth, told her to "shut up," and dragged her off the street. He told her that he just wanted money, but pulled her behind a dumpster and, after punching her in her stomach, pulled her shorts off. While he was raping her, he pulled down her shirt and licked her breasts and neck. He then forced her to turn over and raped her anally. K. repeatedly told the man she had to go to the bathroom, and when he finally released her to go, she ran back to her hotel and asked the desk clerk to call the police. Officers took K. to the hospital where medical staff took biological samples for evidentiary purposes from K.'s person, creating a "sexual assault kit."

¶3 A couple of months later, in the early morning of October 21, 2001, a man entered R.'s bedroom and reached to shut the door. Assuming he was a friend of her

roommate, R. got out of bed and started walking toward him. When she got closer, she saw he was wearing pantyhose over his face and gloves on his hands. She tried to call out to her friend, but he covered her mouth and nose and immobilized her. The next thing she remembered, she was on the floor of her daughter's bedroom,[1] with her mouth taped shut. The man was kneeling in front of her trying to cut more tape from a roll with a knife. He told her to remove her clothes and threatened to kill her if she screamed. He then raped her and, at one point, pulled up part of his mask and told R. to kiss him. Later, he warned her that if she said anything, he would come back and kill her. After R. was sure he was gone, she called 911. The police arrived, found the roll of tape, and took R. to the hospital where hospital staff assembled a sexual assault kit.

¶4 One month later, in November 2001, M.'s daughter, S., sensed someone was looking in her window, but when she got up to look outside, she did not see anyone. A short time later, S.'s bedroom door opened, and she saw someone at the door holding a "little light." Thinking it was her mother, M., she tried to go back to sleep. Moments later, she heard M.'s door close. M. awoke to find a man switching her bedroom light on and off. He jumped on top of her and covered her mouth with his hand. Because M.'s door never shuts all the way, S. got up and went to M.'s room. S. opened the door and asked if her mother was okay. When M. did not answer, S. asked again. The man removed his hand from M.'s mouth, and M. said she was fine. S. opened the door completely and saw the man on top of her mother. Meanwhile, M.'s other daughter, D., had switched the hallway light

[1]Her daughter was gone for the night at a slumber party.

on. The man then ran out of the house. As he did so, he grabbed S. and D. by their hair to shove them aside, breaking some of his fingernails off in the process.

¶5 Prior was indicted on three counts of sexual assault, two counts of kidnapping, one count of aggravated assault, and two counts of residential burglary.[2] At trial, the state presented deoxyribonucleic acid (DNA) evidence that identified Prior as the man involved in all three incidents. Fingerprint evidence also linked him to the sexual assault of R. And Prior admitted parts of the crimes committed against M. and K. The jury found Prior guilty of all counts except one count of aggravated assault and one count of residential burglary.

¶6 On appeal, Prior argues the trial court committed reversible error in denying the motion to sever the charges involving the adult victims. Specifically, he contends the trial court erroneously found the offenses sufficiently similar to justify joinder on that basis. The state counters that Prior forfeited the claim because he did not renew his motion to sever at trial. It further contends Prior has failed to show fundamental error or prejudice resulting from the alleged error.

¶7 A defendant who fails to renew a motion to sever during trial waives any legal claim based on a denial of that motion. Ariz. R. Crim. P. 13.4(c), 16A A.R.S. Prior did not renew his motion at trial or before the close of evidence; therefore, we review his argument only for fundamental error. *See State v. Laird*, 186 Ariz. 203, 206, 920 P.2d 769, 772 (1996); *see also State v. Bruni*, 129 Ariz. 312, 316, 630 P.2d 1044, 1048 (App. 1981)

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[2]Prior was also indicted for residential burglary, kidnapping, molestation, sexual conduct with a minor, sexual assault, and assault based on a separate incident with a minor. Those counts were severed before trial.

(addressing severance argument even though motion not renewed). The defendant has the burden of proving fundamental error. *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Such error has been defined as "going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). To be entitled to relief, a defendant must demonstrate that the error caused prejudice, such that the defendant could not have received a fair trial. *Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607-08. Establishing prejudice "involves a fact-intensive inquiry" and is thus case specific. *Id.* ¶ 26.

¶8 Even assuming *arguendo* that the trial court denied the motion to sever without an adequate basis in the law, Prior has not explained with any particularity how he was prejudiced by that error. Prior maintains generally that "the trial court's refusal to grant a severance as to the adult female victims unduly prejudiced [him]" because "the State is not permitted to prove a defendant's guilt of one act through excessively prejudicial evidence of other acts." However, Prior has not provided any facts or analysis specific to this case that support his claim of prejudice. Indeed, our review of the evidence—evidence that included DNA evidence on each count and Prior's admissions on two counts—suggests that any error in declining to sever the counts would have been harmless rather than prejudicial. Because Prior's claims of prejudice are inadequately developed and unpersuasive, we reject his assertion that the trial court erred fundamentally in trying the three cases together.

¶9 Prior next argues the trial court committed reversible error in admitting evidence of seventy-eight videos seized from Prior's bedroom in his parents' house and his parents' shed. Most of those videos depicted sexual assaults of women; one depicted a teenage girl being kidnapped and sexually assaulted. After a hearing on the issue, the trial court found the videos admissible under both Rule 404(b) and 404(c), Ariz. R. Evid., 17A A.R.S., but concluded that a jury's viewing of the tapes "would substantially outweigh the evidentiary value by danger of unfair prejudice."

¶10 Thus, the court granted Prior's motion to preclude the state from showing the videos but allowed the state to present evidence that police officers had seized the videos from Prior's residence with "a brief non-cum[]ulative description of their content" and their titles. In compliance with that ruling, the state elicited testimony about the locations of the videos when seized, the titles of two of the videos, and brief descriptions of their contents. One of the videos was entitled "After School Surprise" and showed the "abduction, bondage, and raping of a young girl by masked men." Defense counsel briefly cross-examined the witness on the topic, and the videos were not mentioned again.

¶11 In the context of a trial involving the sexual assault of three adult women, we agree with Prior that the title and content of that video carried no additional probative value beyond the officer's arguably admissible testimony that numerous videos depicting sexual assault had been found at Prior's residence. At the same time, we acknowledge the risk that the title and description might have inflamed the passions of the jury against Prior. But we conclude any error the trial court made in admitting testimony about the videos was

harmless. *See State v. Beasley*, 205 Ariz. 334, ¶ 27, 70 P.3d 463, 469 (App. 2003) (affirming trial court's ruling despite finding abuse of discretion in its admitting evidence of prior convictions because error was harmless).

¶12 "Error is harmless if the reviewing court can say beyond a reasonable doubt that the error did not contribute to the verdict." *State v. Davolt*, 207 Ariz. 191, ¶ 39, 84 P.3d 456, 470 (2004). As discussed, the state presented ample evidence of Prior's guilt—DNA evidence that linked him to all three sexual assaults, partial confessions by Prior regarding the assaults of K. and M., and fingerprint evidence linking him to the assault of R. When such evidence is contrasted to the limited mention of these videos, we have no hesitation in concluding, beyond a reasonable doubt, that the jury's verdicts would not have changed if the evidence had been suppressed. *See id.* ¶ 43.

¶13 Prior lastly argues that he deserves to be resentenced under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), because the trial court erred in imposing aggravated sentences without a jury's determining any of the aggravating factors. The trial court imposed aggravated sentences based on the serious physical and emotional harm caused to the victims, Prior's infliction or threatened infliction of serious physical injury, Prior's entrance into a private residence with the intent to commit an assault, and the existence of multiple victims. The state contends the trial court properly aggravated the sentences because the jury implicitly found the existence of multiple victims, which complied with the requirements of *Blakely*.

¶14 A trial court may exercise discretion "within a sentencing range established by the fact of a prior conviction, facts found by a jury, or facts admitted by a defendant." *State v. Martinez*, 210 Ariz. 578, ¶ 16, 115 P.3d 618, 623 (2005). "[O]nce a jury implicitly or explicitly finds one aggravating factor, a defendant is exposed to a sentencing range that extends to the maximum punishment available under section 13-702." *Id.* ¶ 21; *see also* A.R.S. § 13-702. If an aggravating factor has not already been identified by the legislature, trial courts are permitted to consider "[a]ny other factor that the court deems appropriate to the ends of justice." 2003 Ariz. Sess. Laws, ch. 225, § 1 (former A.R.S. § 13-702(C)(20)).[3] This "catch-all" provision gives a trial court wide discretion in identifying appropriate aggravating factors, which "can include any factor that relates to the character or background of the defendant or the circumstances surrounding the commission of the crime that increase the crime's guilt or enormity or adds to its injurious consequences." *State v. Elliget*, 177 Ariz. 32, 36, 864 P.2d 1064, 1068 (App. 1993).

¶15 The trial court's finding of multiple victims was inherent in the jury's verdicts finding him guilty of sexually assaulting two women and burglarizing the home of a third. Although a trial court may not consider the existence of multiple victims as an aggravated circumstance when the existence of multiple victims has been "subsumed in the multiple offenses already used to enhance the sentencing range for those offenses," *State v. Alvarez*, 205 Ariz. 110, ¶ 18, 67 P.3d 706, 711 (App. 2003), the state did not seek such enhancement

[3]Because Prior was sentenced in January 2004, statutory citation reflects the law applicable at the time.

here. And we know of no case law that precludes a trial court from otherwise finding the serial nature of a perpetrator's offenses as an aggravating factor under the catch-all provision of § 13-702. Because the trial court had broad discretion in identifying aggravating circumstances "appropriate to the ends of justice" under that provision, 2003 Ariz. Sess. Laws, ch. 225, § 1, it did not err in finding that aggravating factor here.

¶16 For the foregoing reasons, we affirm the convictions and sentences.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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PHILIP G. ESPINOSA, Judge